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HRD09/4342

May 22, 2009

Honorable Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

RE: Request for comments on Clayton Suzuki, et al.'s Surface Water Use Permit Application – Existing Uses, Nā Wai `Ehā Surface Water Management Areas, Maui.

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on Clayton Suzuki, Linda Kadosaki, Reed Suzuki, and Scott Suzuki's (collectively, the Suzukis) Surface Water Use Permit Application (SWUPA) for an existing use in the Nā Wai `Ehā Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai`i 97, 149, 9 P.3d 409, 461 (2000) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "*the Commission may reclaim instream values to the inevitable displacement of existing offstream uses*" (emphasis added)). Nor can it be determined whether there are "competing applications" within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered

until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, the Suzukis should not have any priority simply by virtue of the fact that they filed their SWUPA earlier than other existing users.

The Suzukis claim to have appurtenant rights to water, which *would* give them priority over other existing users but for the fact that the Suzukis' claim of appurtenant rights is admittedly spurious. The deed to the Suzuki's property expressly reserves all water rights, including appurtenant rights, to the Grantor,[1] thus effectively severing any appurtenant rights. *See Reppun v. Board of Water Supply*, 65 Haw. 531, 550-52, 656 P.2d 57, 70-71 (1983) (holding that an attempt to reserve appurtenant rights to the grantor effectively extinguished those rights). Clayton Suzuki, who is employed by Wailuku Water Company (WWC), testified unequivocally under oath during the IIFS contested case hearing that when he created WWC's list of kuleana users and added himself to that list, he *knew* that his property did not have appurtenant rights:

> Mr. Suzuki, do you know who created this list that's Exhibit D-7?
> A I did.
> Q And so did you add your name to this list?
> A Yes.
> Q When you added your name to the list of kuleana users, did you have any reason to know that your property didn't have appurtenant rights?
> A I did.
> Q But you do take water from that kuleana ditch?
> A I do.
> * * *
> Q (By Ms. Sproat): Mr. Suzuki, I wanted to continue talking about your kuleana use of water in Waikapu. You mentioned that you had added your name to the list of kuleana users.
> A Correct.
> Q Even though you knew that you didn't have appurtenant rights?
> A Correct.
> Q I'm showing you what has been marked as Exhibit A-151. Can you take a few moments to look that over. It's the deed for Mr. Suzuki's property. It's a quitclaim deed.

[1] The deed by which the Suzukis purchased their land from Wailuku Agribusiness Co., Inc. was admitted as Exh. A-151 in the IIFS contested case hearing.

A Yes.
Q Is the reason that you knew that you didn't have appurtenant rights for your property reflected in that deed?
A Yes.
Q So when you purchased the property from Wailuku, they severed your appurtenant rights?
A Correct.

Tr. 12/14/07 (Suzuki), p. 140, l. 17 to p. 143, l. 17. The Suzukis clearly and admittedly do not have an appurtenant right to water from Waikapū Stream, and their existing use should not be considered until adequate provision is made to satisfy public trust purposes, including the needs of those who *legitimately* claim appurtenant rights.[2]

If there is water available after public trust purposes are adequately provided for to accommodate commercial and landscaping uses such as the Suzukis', the Suzukis' claimed existing use should be carefully examined before being considered for a Surface Water Use Permit. In December 2007, just four months prior to the effective date of designation, Clayton Suzuki testified that his use was for "some farmers on my parcel, and also use it to irrigate my landscaping. . . . I estimate about three-quarters acre in crops and about three-quarters acre in landscaping." Tr. 12/14/07 (Suzuki), p. 141, ll. 16-23. Now, the Suzukis claim an existing use on 4.34 acres (SWUPA, Table 3), nearly *three times* the 1.5 acres Mr. Suzuki testified to just months prior to designation.

Of the 4.34 acres the Suzukis now claim are irrigated, only 1.32 acres are being used for crops (dryland taro, bitter melon, and fruit trees). Even if that use existed prior to designation (as opposed to the 0.75 acres of crops Mr. Suzuki testified to), this Commission determined in the Waiāhole Ditch case that 2,500 gallons per acre per day (gad) is a reasonable water duty for diversified agriculture on the dry leeward plain of Oahu, and that amount should be more than sufficient at the base of the mountains in Waikapū.

The balance of the irrigated acreage, 3.02 acres, consists of 1 acre of lawn and 2.02 acres of "pasture," which appears from the photographs included in the Suzukis' SWUPA to be an extension of the lawn, with no livestock visible. The Suzukis claim that their uses are consistent with the public interest because 3.373 of their total 4.433 acres have been dedicated as agricultural land with the County of Maui for a period of ten years. SWUPA, p. 5. OHA disagrees. The Suzukis' dedication may reduce the real property taxes they pay (*see* Maui

[2] The Suzukis are the first users to take water from the Reservoir 1 `auwai (Tr. 12/14/07 (Suzuki), p. 141, ll. 1-6), and thus take water before those who have bone fide appurtenant rights and traditional and customary Hawaiian rights.

County Code 3.48.350), but that does not mean that it is consistent with the public interest to use scarce water resources to irrigate 3 acres of lawn.

For the foregoing reasons, OHA objects to the Suzukis' SWUPA.

OHA is the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians." (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at granta@oha.org.

'O wau iho nō me ka 'oia'i'o,

Clyde W. Nāmu'o
Administrator

C: OHA CRC Maui